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Board of Appeal

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**Datasheet for the decision
of 17 September 2015**

Case number: G 2301/15

Language of the proceedings: EN

Petitioner:

Administrative Council of the European Patent Organisation

Respondent:

...

Headword:

Request for a proposal of removal from office

Relevant legal provisions:

EPC Art. 22, 23(1), 24(3), (4), 113(1), 117(1)

EPC R. 13

RPEBA Art. 2(5), 12a, 13, 14(2), (4), 18(3)

BDS/EBA Art. 1, 2, 10

ServRegs Art. 14(1), 20(1), (2), 93, 102(3)

Rules of procedure of the Administrative Council Art. 4

Keyword:

"Request from the Administrative Council for a proposal that a member of the boards of appeal be removed from office under Article 23(1) EPC"

"Composition of the Enlarged Board of Appeal in proceedings under Article 23(1) EPC"

"Requirements in terms of reasons and substantiation to be fulfilled by a request under Article 12a(5) RPEBA"

"Reimbursement of all the respondent's procedural costs proposed"

Decisions cited

G 0006/95

Headnote:

1. The law-making bodies have so shaped the proceedings for a decision for a proposal under Article 23(1) EPC that they take proper judicial form. The arrangements laid down in Articles 2(5) RPEBA and Article 10 BDS/EBA for the composition of the Enlarged Board of Appeal in proceedings under Article 23(1) EPC are compatible with the European Patent Convention and general principles of law.
2. Article 12a(5) RPEBA requires that the request under Article 12a(1) RPEBA specify individual incidents and the evidence for them, and give reasons why they constitute a serious ground within the meaning of Article 23(1) EPC.



Case number: Art. 23 1/15

D E C I S I O N
of the Enlarged Board of Appeal
of 17 September 2015

Petitioner: Administrative Council of the
European Patent Organisation
Bob-van-Benthem-Platz 1
D-80469 Munich (DE)

Representatives: ...
European Patent Office
Bob-van-Benthem-Platz 1
D-80469 Munich (DE)

Respondent: ...

Representative: ...

Composition of the board:

Chairman: I. Beckedorf
Members: K. Klett
A. Dimitrova
M.-B. Tardo-Dino
E. Dufrasne
U. Oswald
H. Meinders

Summary of facts and submissions

- I. These proceedings concern the request of 25 June 2015 (hereinafter: AC request) from the chairman of the Administrative Council of the European Patent Organisation (hereinafter: the petitioner) for a proposal that the respondent be removed from office as a member of the boards of appeal under Article 23(1), first sentence, EPC and the rules of procedure of the Enlarged Board of Appeal (RPEBA) as approved by the Council on 25 March 2015 (CA/D 3/15).
- II. In the AC request, the petitioner referred to the Council's decision of 26 March 2015 (CA/28/15, item 10.1, page 5) to initiate disciplinary proceedings against the respondent, and said he had just received the opinion of the Council's Disciplinary Committee (hereinafter: DC) recommending the respondent's removal from office.
- He added that the DC's opinion was an integral part of the AC request, and that the documents provided to the DC - available on a USB stick and including the facts, arguments and evidence on which they were based - would be submitted in due course. He also indicated that the Council would be represented in the proceedings by ... Concluding, he said he expected to receive the information about how the Enlarged Board assessed the case in time for the Council to take a final decision at an extraordinary meeting planned for early September.

- III. ... *[summary of the confidential DC's opinion - added for ease of understanding]*
- IV. ... *[summary of the confidential DC's opinion - added for ease of understanding]*
- V. On 29 June 2015, the Enlarged Board received several copies of the USB stick promised by the Council chairman in the AC request.
- VI. On 30 June 2015, following receipt of the AC request, the composition of the Enlarged Board to hear the case was determined, and by letter of 2 July 2015 the petitioner and the respondent (hereinafter: the parties) were summoned to attend oral proceedings on 4 and 5 August 2015 and the respondent was set a time limit of Monday, 27 July 2015 for making any written submissions. In addition, the Vice-President in charge of Directorate-General 3 (Appeals) (hereinafter: VP3) was invited to comment under Article 12a(2) RPEBA. He submitted substantive comments on 22 July 2015.
- VII. In submissions received on 15 July 2015 the respondent made several procedural requests and argued that the AC request was not admissible.
- VIII. By letter of 17 July 2015, the then chairwoman of the Enlarged Board said in response to the admissibility objections, without prejudice to the Enlarged Board's subsequent decision, that the facts to be regarded as forming the basis for the AC request were limited to those considered in the DC's opinion of 23 June 2015

and that as a consequence the USB-stick material referred to in the AC request could not be used to extend the proceedings to new issues.

IX. On 20 July 2015 the respondent made further submissions to the Enlarged Board, inter alia repeating his objections that the AC request was inadmissible. In particular, the subject-matter of the proceedings was still not clear, as the AC request referred to facts, arguments and evidence on the USB stick, and the procedural papers included documents relating to allegations dismissed by the DC and stored somewhere on that data carrier.

X. ... *[procedural aspects - added for ease of understanding]*

XI. On 28 July 2015 the respondent filed an objection against the then chairwoman under Article 24(3) EPC.

XII. On 5 August 2015 the Enlarged Board took an interlocutory decision under Article 24(4) EPC allowing this objection and appointing a new member of the Enlarged Board in her place.

XIII. The (main) proceedings were structured as follows: first, the procedural issues raised by the respondent - notably the admissibility of the AC request - would be discussed and considered in initial oral proceedings; then, if the request was admissible, the substance of the allegations would be addressed.

XIII.1 Oral proceedings to decide on the AC request's admissibility were appointed for 16 and 17 September 2015.

XIII.2 To prepare for these oral proceedings, the Enlarged Board informed the parties by written communication of 14 August 2015 under Articles 12a, 13 and 14(2) RPEBA that the following issues in particular would be addressed:

- (1) The respondent's argument that Article 2(5) RPEBA was not compliant with Article 23(1) EPC (point 2.1 of the communication)
- (2) His argument that the AC request was inadmissible on four grounds, namely
 - (a) the Council chairman had no mandate to make it (point 2.2(a))
 - (b) it was not substantiated (point 2.2(b))
 - (c) it was premature (point 2.2(c)) and
 - (d) the DC's opinion contained serious deficiencies (point 2.2(d)).
- (3) The communication also mentioned (point 2.3) the respondent's requests that the proceedings be stayed and (point 2.4) a public hearing held.

XIII.3 Written comments for the oral proceedings were filed by the respondent on 10 September 2015, and by the petitioner's representatives on 15 September 2015.

XIV. At the oral proceedings, on 16 September 2015, the respondent confirmed his request that the AC request be rejected as inadmissible.

The petitioner's representatives requested that the AC request be found admissible, and that substantive proceedings under Article 23(1) EPC be started.

- XV. The parties commented on the individual issues, in the order of their presentation in the communication of 14 August 2015.

In reply to a question from the chairman, the respondent confirmed that his request for a public hearing applied only to any consideration of the merits of the AC request, not to the admissibility issues. He withdrew his request for a stay.

After discussing at length with the parties the facts and the law concerning the admissibility of the AC request, the Enlarged Board closed the debate and adjourned the oral proceedings for deliberation.

- XVI. After this internal deliberation, the Enlarged Board resumed the oral proceedings on 17 September 2015.

The chairman informed the parties that the Enlarged Board regarded the AC request as inadmissible.

The petitioner's representatives thereupon asked the Enlarged Board to reopen the oral proceedings on admissibility, so that the petitioner could make the following request:

"The Enlarged Board of Appeal shall inform the Council representatives what exactly it wishes to receive from

the Administrative Council in order to proceed with a substantive examination of the request for a proposal for removal from office of the respondent."

The respondent said this request should not be granted. After discussion with the parties and internal deliberation, the Enlarged Board refused it.

XVII. The parties were then heard regarding costs.

XVIII. The parties' final requests were as follows:

XVIII.1 As per the AC request initiating these proceedings, the petitioner wanted the Enlarged Board to

1. make a proposal to the Council for the respondent's removal from office as a member of a board of appeal pursuant to Article 23(1) EPC

and, during the oral proceedings, it asked the Enlarged Board to

2. reject the respondent's admissibility objections to the AC request
3. proceed with the examination of the substance of the AC request, and
4. dismiss the respondent's request for reimbursement of costs or, failing that, limit any cost reimbursement to the debate on admissibility and to legal fees under German law.

XVIII.2 The respondent asked the Enlarged Board to

1. dismiss the AC request as inadmissible, and
2. propose to the Council that all costs incurred by the respondent in the proceedings be reimbursed.

XIX. At the end of the oral proceedings and after internal deliberation, the chairman announced the Enlarged Board's decision as set out in the Order.

Reasons for the decision

Preliminary remarks

1. The title of Article 23 EPC is "Independence of the members of the Boards". Under Article 23(1) EPC, members of the boards of appeal, whose function as judges is generally recognised, are appointed for a term of five years and may not be removed from office during this term unless there are serious grounds for such removal and the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to that effect.
2. Under Article 23(4) EPC, the rules of procedure of the boards of appeal and the Enlarged Board of Appeal are adopted in accordance with the Implementing Regulations. They are subject to the approval of the Administrative Council. Under Rule 13(2) EPC, the RPEBA are adopted by the (internal) members of the Enlarged Board appointed under Article 11(3) EPC.

Under these provisions, by decision of 25 March 2015 (CA/D 3/15), the Council approved amendments to the RPEBA which had been adopted by the Enlarged Board on 19 March 2015.

3. Article 2(5) RPEBA governs the Enlarged Board's composition in proceedings under Article 23(1) EPC. It provides that in such cases the Enlarged Board is composed according to the provisions of Article 22(2), first sentence, EPC, the chairman being replaced by his alternate and two of the legally qualified members being external members.

More details about deputising for the chairman and the Enlarged Board's composition in specific cases are set out in Article 10 in conjunction with Articles 1(2) and 2(1)(a) and (b) of the Enlarged Board's business distribution scheme (hereinafter: BDS/EBA).

The respondent's admissibility objections

4. These objections come under three headings:
 - a) Unlawfulness, i.e. the composition of the Enlarged Board under Article 2(5) RPEBA was incompatible with Article 23(1) EPC and general principles of law (see section 5 below)
 - b) Procedural, i.e. the Council chairman and the petitioner's representatives were not duly authorised, the disciplinary proceedings were premature, and the disciplinary proceedings and the DC's opinion were flawed (see section 6 below), and

- c) AC request, i.e. it was not properly substantiated (see section 7 below).

Unlawfulness objections

- 5. The respondent objects that the present Enlarged Board's composition is incompatible with the EPC and general principles of law. As already stated in the Enlarged Board's communication of 14 August 2015 (in its point 2.1), this objection does not withstand incidental legal review of compatibility with Article 2(5) RPEBA (and thus implicitly also with Article 10 BDS/EBA).
- 5.1 The EPC contains provisions concerning the powers and proceedings of the Enlarged Board. They state that the Enlarged Board is responsible for ruling on points of law referred to it by a board of appeal or the President (Article 22(1)(a) and (b) EPC), or on petitions for review requested by a party under Article 112a EPC (Article 22(1)(c) EPC).
- 5.2 For Enlarged Board rulings under Article 22(1) EPC, Article 22(2) EPC provides that in proceedings under paragraph 1(a) and (b) the Enlarged Board consists of five legally and two technically qualified members, and in proceedings under paragraph 1(c) of three or five members. However, the Enlarged Board's composition for a proposal for the exceptional situation of a removal of a board member from office under Article 23(1) EPC is not regulated in the EPC itself.

In particular, the EPC does not stipulate that a proposal to remove a board member from office on serious

grounds under Article 23(1) EPC is to be decided on by the full Enlarged Board (i.e. consisting of all its internal and external members under Article 1 BDS/EBA). This cannot be inferred in particular from the provision as worded, because what Article 22 EPC refers to as the "Enlarged Board of Appeal" are boards of varying (but in any case limited) compositions.

5.3 Nor therefore can it be inferred from the words "Enlarged Board of Appeal" in Article 23(1) EPC that a proposal to remove a member on serious grounds must be decided on by the Enlarged Board in its entirety. Rather, the rules governing its composition are to be adopted by the bodies responsible for the corresponding implementing provisions, as expressly laid down in Article 23(4) EPC.

5.4 In the institutional structure of the European Patent Organisation, the Council as a body is responsible above all for adopting secondary legislation where the contracting parties to the EPC have not done so themselves (Article 33 EPC). At the Enlarged Board's request (Article 23(4) EPC, Rule 13(2) EPC), it has decided that proceedings under Article 23(1) EPC are to be conducted in proper judicial form.

Thus it is up to the Council, as the appointing and disciplinary authority for board of appeal members (Article 11(3) and (4) EPC), or to VP3 as the vice-president in charge of the boards, to make a request to the Enlarged Board (Article 12a(1) RPEBA). This sets in train adversarial proceedings to which the respondent is a party (Article 12a(4) RPEBA). He must be able to

comment on the allegations made against him and regarded by either his appointing authority or administrative superior as so serious as to justify his removal from office. Article 12a(6) RPEBA expressly states that the proceedings may not be concluded without the respondent being informed of the facts, arguments and evidence underlying the request and having had the opportunity to be heard on them. It also says that in these proceedings, which are conducted in writing, supplemented if necessary by oral proceedings, he may be represented or advised. Given the reference to Article 117(1) EPC, which lists the means of giving or obtaining evidence, the Enlarged Board must satisfy itself in proceedings under Article 23(1) EPC that the allegations made against a board member are indeed true.

- 5.5 Thus the proceedings which may lead to a board member's removal from office on serious grounds within the meaning of Article 23(1) EPC take the form of a judicial procedure. That means - contrary to the view expressed by the petitioner's representatives in the oral proceedings - that it cannot be equated with an administrative or executive-legislative activity. Since it is not an administrative or executive-legislative activity, the necessity of a full Enlarged Board of Appeal (further subject to a quorum for taking decisions) as foreseen for such activities by Rule 13 EPC is neither given, contrary to the respondent's opinion.

Rather, and logically enough, the legislative bodies responsible have specified that for a decision on a request under Article 23(1) EPC the Enlarged Board is composed as laid down in Article 22 EPC for its judicial

proceedings. That the European Patent Organisation bodies responsible for enacting implementing legislation opted in Article 2(5) of the amended RPEBA for the largest Enlarged Board composition possible for such proceedings shows they attached due importance to proposals under Article 23(1) EPC.

- 5.6 Article 23 EPC contains provisions which are intended to ensure the "independence of the members of the boards" in their work as judges. The independence of judges is a principle which is recognised and applied in all member states of the European Patent Organisation, as corresponding to the very nature of the judicial function. The provisions of the EPC concerning the boards of appeal must therefore be interpreted in the light of this general principle (G 6/95, OJ EPO 1996, 649, Reasons point 2).

There is certainly no indication that the procedure for removing a member, as laid down in the RPEBA approved on 25 March 2015, could run counter to basic principles of judicial independence generally recognised in the EPC contracting states.

True, removing a judge is always problematic in terms of judicial independence. The independence of legal decision-making - traditionally ensured in democracies primarily vis-à-vis the other state powers (legislative and executive) - is jeopardised not only when a specific decision is directly influenced but also and especially if undue pressure is brought to bear on judges or if the resources they need to actually do their work are withheld. The possibility of removing an irksome judge

from office can thus be used to indirectly influence decisions. That is why it is generally regarded as crucial to judicial independence that judges cannot be removed from office without special institutional safeguards; this makes sure that removal is actually objectively justified.

The above considerations certainly apply also to members of the boards of appeal, who exercise a judicial function that is generally recognised and derives straight from the EPC.

Therefore, for disciplinary action against (professional) judges in particular, the member states of the Council of Europe - most of which also belong to the European Patent Organisation - have as a rule set up state bodies to be used in exceptional removal procedures laid down by law. These bodies and procedures differ, however, so there is no general institutional model which might guide an international institution such as the European Patent Organisation (see CEPEJ report No. 20 on "European judicial systems - Edition 2014 (2012 data): efficiency and quality of justice", page 354 ff.; *Systèmes judiciaires européens. Efficacité et qualité de la justice, Les Etudes de la CEPEJ no. 20, Edition 2014 (données 2012), page 369 ff.*).

- 5.7 The rules implementing Article 23(1) EPC - as regards powers and procedures for the exceptional removal of board of appeal members - that have been adopted in the RPEBA by the law-framing bodies responsible within the European Patent Organisation are in line with said provision's object and purpose.

For the fact that a board member can exceptionally be removed from office only on a proposal from the Enlarged Board is intended to make sure that unsubstantiated or groundless, made-up allegations cannot be used as a pretext for getting rid of an irksome judge.

The Enlarged Board must satisfy itself, in adversarial proceedings conducted in proper judicial form, that the allegations made are indeed true, and so serious as to require the judge's removal from office. Only on the basis of proceedings meeting that general yardstick for justice can the Council take a decision that is so far-reaching, both personally and institutionally. These proceedings thus embody the legislative intent codified in Article 23(1) EPC.

That other ways of implementing Article 23(1) EPC might be conceivable does not mean there is no compliance with the EPC.

- 5.8 The respondent also requests that all documents on the procedure leading to the 25 March 2015 decision to amend the RPEBA be disclosed to him. However, he has put forward no evidence of any deficiencies in the proceedings followed in compliance with the only procedure foreseen by the EPC (see points 2 and 5.4 above).
- 5.9 The respondent's objection that Article 2(5) RPEBA runs counter to Article 23(1) EPC and general principles of law is thus unfounded.

Procedural objections

6. The AC request asking the Enlarged Board to make a proposal that a specified technical board of appeal member be removed from office is signed by the chairman of the Administrative Council.

The respondent argues that he had no power to do so, and that the Council as a whole must decide to make such a request, or delegate this task to its chairman - which did not happen.

- 6.1 The EPC does not set out the Council chairman's duties in any detail.

The relevant chapter (Articles 26 to 36 EPC) provides that the Council elects a chairman (and deputy chairman) from among the EPO member states' representatives and their alternates, for a term of three years (Article 27 EPC), and his task is to convene the Council's meetings (Article 29(1) EPC). In addition, under Article 28 EPC the Council can also elect a five-member Board and assign duties to it in accordance with the rules of procedure (Article 28(4) EPC).

Under Article 4 of the Council's rules of procedure (CA/D 8/06 as amended by CA/D 21/09, CA/D 10/12 and CA/D 20/13), cited by the petitioner's representatives, the chairman is responsible for the work of the Council and the exercise of its functions, and in particular for presiding over its meetings.

From that, no delegation of the power to submit a request for an Enlarged Board proposal within the meaning of Article 23(1) EPC can be inferred.

- 6.2 Both parties cite the decision taken by the Council at its 143rd meeting on 25 and 26 March 2015 (summary of decisions, CA/28/15, item 10.1: follow-up to the Council's decision CA/D 12/14 - investigation report CA/C 4/15).

At that meeting, the Council unanimously decided to initiate disciplinary proceedings against an employee it had appointed, who was suspected of misconduct. To that end, an *ad hoc* Disciplinary Committee was to be set up, tasked with delivering an opinion on whether or not the employee had breached his obligations and, if so, recommending an appropriate sanction for such breach.

The DC's opinion and recommendation would then be forwarded to the Enlarged Board, pursuant to Article 23 EPC, and to the EPO President, who would both give their opinions - to be also submitted to the Council, which would take the final decision.

- 6.3 ... *[observations of the Enlarged Board in respect of the non-public document CA/C 4/15 - added for ease of understanding]*

- 6.4 ... *[observations of the Enlarged Board in respect of the non-public document CA/C 4/15 - added for ease of understanding]*

Although neither the request nor the decision expressly refers to the possible outcome of the proceedings before the DC, it is apparent from the possible follow-up measures that it was intended, "once the DC has issued its opinion", to make future arrangements "for the Council to take an informed decision, bearing in mind Article 23(1) EPC", i.e. for the eventuality that the DC found that misconduct justifying removal from office had occurred.

...

As the Council, under item 10.1 of the summary of the decisions it took at its 143rd meeting on 25 and 26 March 2015 (CA/28/15), not only initiated disciplinary proceedings but also specified what would happen once the DC's report was available, it is to be concluded that it agreed to its chairman's proposal of 18 March 2015.

The Council's decision of 25/26 March 2015 can thus be understood to mean that, were the DC to propose dismissal, it had mandated its chairman to submit to the Enlarged Board a request for a proposal within the meaning of Article 23(1) EPC.

- 6.5 Thus the Council did authorise its chairman to submit the AC request to the Enlarged Board under Article 23(1) EPC, and the respondent's objection that the Council chairman was not empowered to request a proposal for his removal from office is unfounded.

6.6 This also means that the Council chairman had the power to appoint and authorise representatives to act for the petitioner in the proceedings before the Enlarged Board. So this objection too must fail.

6.7 On the respondent's further objection that continuing the disciplinary proceedings prejudged the proceedings under Article 23(1) EPC and that the petitioner should have discussed the DC's opinion in plenary session, with all Council members present, and should also have heard him under Article 102(3) ServRegs, the Enlarged Board has already commented in its communication of 14 August 2015 citing Article 12a(8) RPEBA, which provides that Enlarged Board proceedings are conducted independently of any disciplinary or national proceedings.

That means that continuing the Council disciplinary proceedings cannot prejudice the present judicial proceedings. Rather, the former are formally concluded only when the Council, as appointing and disciplinary authority under Article 11(4) EPC, takes its decision. It is (only) prior to that decision that a hearing under Article 102(3) ServRegs must take place.

However, for the Council to apply to a board member the most severe disciplinary sanction available (dismissal according to Article 93(2)(f) ServRegs), Article 23(1), first sentence, EPC requires that it must first have received a proposal for their removal from office from the Enlarged Board. But that does not change the principle that administrative disciplinary proceedings under Article 93 ff. ServRegs before the appointing authority are separate from judicial proceedings before

the Enlarged Board, which is not the appointing authority.

The objection that the disciplinary proceedings were prejudicial must therefore fail. If the objection raised against point 2.2(c) of the Enlarged Board communication of 14 August 2015 is also to be understood as arguing that the Council should first have discussed the outcome of the disciplinary proceedings before taking a formal decision to initiate proceedings under Article 23(1), first sentence, EPC, then it concerns whether the Council chairman (alone) had the authority to submit the AC request. That matter was decided in the affirmative in the previous section above.

- 6.8 The respondent's further objection that the disciplinary proceedings and the DC's opinion were flawed would involve both reviewing the disciplinary proceedings and assessing the petitioner's allegations that the respondent has committed misconduct constituting a serious ground within the meaning of Article 23(1), first sentence, EPC.

It is quite clear from Article 12a(8) RPEBA, stating that removal proceedings are conducted independently of any disciplinary proceedings, and from the fact that proceedings under Article 23(1), first sentence, EPC are adversarial and conducted in proper judicial form, that the purpose of the Enlarged Board proceedings is not to conduct a formal review of the disciplinary proceedings; on the contrary, they are conducted independently of the disciplinary proceedings.

Assessing the allegations made against the respondent, and deciding whether they give rise to a serious ground within the meaning of Article 23(1), first sentence, EPC, would go (well) beyond evaluating their admissibility; it would mean examining their substance.

Therefore, this objection too fails to establish that the AC request is inadmissible.

AC request-related objections

7. Proceedings before the Enlarged Board under Article 23(1) EPC are regulated in Article 12a RPEBA.
- 7.1 A request for a proposal may be made by either the Council or VP3 (Article 12a(1) RPEBA).
- 7.2 In either case, the request must set out all the facts, arguments and evidence relied on, and all documents referred to must be attached (Article 12a(5) RPEBA).
- 7.3 The procedure that may lead to a proposal from the Enlarged Board for removal from office within the meaning of Article 23(1) EPC takes the form of quasi-judicial adversarial proceedings (see point 5.5 above). The rules expressly state that the member who is the subject of the request is a party to the proceedings as respondent (Article 12a(4) RPEBA) and that the proceedings may not be concluded without the respondent being informed of the facts, arguments and evidence underlying the request and having had the opportunity to be heard on them (Article 12a(6) RPEBA). The proceedings are then to be conducted in writing, if necessary

supplemented by oral proceedings, and the respondent may be represented or advised (Article 12a(6) RPEBA).

Article 117(1) EPC on the taking of evidence is applicable (Article 12a(7) RPEBA), and the proceedings are to be conducted independently of any disciplinary or national proceedings (Article 12a(8) RPEBA).

7.4 In adversarial inter partes proceedings, the parties, and in this case the petitioner in particular, are required to produce the facts and evidence and give reasons why, from the petitioner's perspective, the facts adduced - and in its view proven - are so serious as to warrant the respondent's removal from office as a member of a board of appeal. In adversarial proceedings the respondent must have an opportunity to refute the allegations. He must be able to comment on all the facts adduced, to state his case in full awareness of the allegations and to rebut any evidence. It is up to the Enlarged Board to judge whether the specific facts adduced are proven by the evidence produced and whether the proven facts exceptionally warrant the exceptional removal from office of the respondent.

7.5 However, the Enlarged Board is not there to define of its own motion which facts may be derived from documents and exhibits. The respondent is a party to the proceedings and can exercise his full right to be heard only if the facts held against him are explicitly described.

7.6 The AC request does not say what facts are held against the respondent. Instead it refers to the DC's opinion

and declares it to be an integral part of the request for a proposal.

In that opinion, the accusations made against the respondent, substantiated by a huge volume of data and documents ..., are grouped into five allegations.

[summary of points 1 to 5 of the confidential DC's opinion - added for ease of understanding]

7.7 At the oral proceedings the petitioner's representatives expressly stated - and confirmed more than once when asked by the Enlarged Board - that they maintained all five of these allegations, which had been raised by the Administration, i.e. the EPO and its departments, in particular the investigative unit, in the disciplinary proceedings against the respondent. Their view was that the Enlarged Board had been presented with all the evidence on the subsequently filed USB stick and so was fully informed and in a position to form its own view of the respondent's conduct.

7.8 Under Article 12a(5) RPEBA, the request under Article 12a(1) RPEBA must set out the "facts, arguments and evidence relied on".

The facts have to be described and presented clearly enough for the respondent to be able to comment on them in a fully informed manner.

The Enlarged Board must be able to satisfy itself that the facts explicitly set out in the request are proven, so as to judge on that basis whether they constitute serious grounds within the meaning of Article 23(1),

first sentence, EPC and therefore warrant a proposal for removal from office under Article 23(1) EPC.

7.9 As the AC request itself does not adduce any facts that in the petitioner's view warrant the extraordinary removal from office of the respondent, those facts would have to be explicitly set out within the meaning of Article 12a(5) RPEBA in the DC's report of 23 June 2015, together with the supporting evidence.

7.10 Firstly, the five issues under which the DC dealt with the evidence against the respondent constitute general allegations which in turn rest at best upon specific facts.

Thus the DC - without ultimately expressing a view on the reliability of the evidence produced - concluded under issue 1 that the respondent ... and under issue 2 that he ... *[had committed certain acts he was accused of - added for ease of understanding]*

7.11 The DC's opinion goes into these allegations in more detail, but adduces no specific facts in relation to the allegations grouped under issues 3 to 5 ... *[observation of the DC in its confidential opinion - added for ease of understanding]*

With regard to allegations 3 to 5, the DC's opinion provides no facts at all which under Article 12a(5) RPEBA are set out explicitly enough for evidential purposes. Hence allegations 3 to 5 are not substantiated for the purposes of the AC request.

7.12 Yet even with regard to the allegations that the DC groups under issues 1 and 2, the facts and evidence are not set out explicitly enough for the respondent to comment on them, and for the same reason the Enlarged Board is unable to reconstruct and examine them in order to judge for itself, independently of the disciplinary proceedings as required by Article 12a(8) RPEBA, whether there are serious grounds within the meaning of Article 23(1) EPC. As a result, they cannot be used for evidential purposes under Article 12a(7) RPEBA and Article 117(1) EPC.

Similar considerations apply to the DC's assessment of evidence merely generally outlined in the DC's opinion or of pure deductions from circumstantial evidence not set out or proven in detail therein, none of which can replace either substantiated argument or the production of direct or circumstantial evidence.

... [observations of the Enlarged Board in respect of the allegations under point 1 of the confidential DC's opinion - added for ease of understanding]

The specific facts held against the respondent must be defined on the basis of the evidence indicated in the DC's opinion, to enable judgment to be made, in full knowledge of the circumstances, as to whether they are proven and relevant. It is not good enough to simply refer to facts and evidence and leave the Enlarged Board to reconstruct the events for itself. That does not satisfy the requirements of Article 12a(5) RPEBA nor the respondent's right to know the charges against him.

7.13 The same applies to the allegations considered in issue 2 of the DC's opinion ... *[observations of the Enlarged Board in respect of those allegations - added for ease of understanding]*

It does not however describe the individual acts of which the respondent is accused; the Enlarged Board would have to construe these from the evidence.

... *[observations of the Enlarged Board in respect of the allegations under point 2 of the confidential DC's opinion - added for ease of understanding]*

Evidence that the respondent had sent ... a message ... was found insufficient by the DC, so there is no need for the Enlarged Board to entertain this allegation.

Lastly, the DC was satisfied - again by reference ... - that ... the respondent wrote to ... But again its report does not actually reproduce the alleged insults, so the respondent would not be able to comment on them under Article 12a(6) RPEBA in adversarial proceedings before the Enlarged Board.

7.14 Thus the AC request, taken as a whole, fails to fulfil the formal requirements of factual substantiation prescribed by Article 12a(5) RPEBA to ensure adversarial proceedings in which compliance with parties' generally recognised procedural rights in judicial proceedings, and impartiality on the part of the decision-making body, are guaranteed.

7.15 At the oral proceedings the petitioner's representatives also expressed the view that the Enlarged Board should have informed it beforehand, and more clearly, that there might be admissibility issues with the AC request.

However, that disregards the fact that all the admissibility objections discussed with the parties in the oral proceedings and forming the factual and legal basis for the present decision had already been raised by the respondent, and were also mentioned again in the Enlarged Board's written communication of 14 August 2015 as material points for discussion.

So the petitioner's representatives were - or could have been - aware of these issues from the admissibility objections explicitly raised and substantiated by the respondent at the start of the proceedings, in his first written submissions of 15 July 2015, and from his unqualified request that the AC request be rejected as inadmissible.

From the timetable explained to the parties at the oral proceedings on 5 August 2015 (oral proceedings on admissibility on 16 and 17 September 2015, and - if the request was admissible - on the merits on 8 October 2015), and at the latest on receipt of the Enlarged Board's communication of 14 August 2015 preparing the oral proceedings of 16 and 17 September 2015, it was made quite clear to all parties that the admissibility objections were crucial to the decision.

In such circumstances, no further clarifications for the parties - or for the petitioner alone - were called for.

7.16 Given this outcome, there is no need to consider the respondent's further objection regarding the (in-)admissibility of the USB-stick evidence as announced in the AC request but submitted only later, not together with the request as required by Article 12a(5) RPEBA.

7.17 The AC request is thus to be rejected as inadmissible.

Request to reopen the debate on the admissibility of the AC request

8. The petitioner's representatives' request that this debate be reopened was to be refused.

8.1 Firstly, all the admissibility issues set out in the Enlarged Board's communication of 14 August 2015 were discussed with the parties in depth for over three and a half hours on 16 September 2015.

That gave the parties the opportunity not only to present their own positions on the facts and law but also to comment on the opposing party's submissions. The Enlarged Board also questioned the parties to establish further details and clarify their submissions.

When this discussion was over, the chairman closed the debate on the AC request's admissibility.

8.2 The petitioner did not dispute this in the requests it made and substantiated orally, and then confirmed in writing at the oral proceedings on 17 September 2015.

8.3 After the Enlarged Board had deliberated, when the oral proceedings were resumed on 17 September 2015 its chairman began by informing the parties of its conclusions regarding the admissibility objections discussed the previous day, expressly stating that this was not yet a formal decision but the oral proceedings would now continue with a discussion of the respondent's request for costs, which was still outstanding. It was at this point that the petitioner's representatives then requested a reopening of the debate about the AC request's admissibility which had been closed the day before.

8.4 In the grounds presented orally for this request and reflected in the wording of the written request, the petitioner's representatives said they were making it because they wanted the Enlarged Board to inform them what exactly it wished to receive from the petitioner in order to proceed with a substantive examination of the request for a proposal for removal from office of the respondent.

8.5 Under Article 14(6) RPEBA, a debate is reopened after closure only at the Enlarged Board's discretion, for example if a procedural error material to the decision has occurred, such as an infringement of the right to be heard (Article 113(1) EPC).

Nor is the Enlarged Board under any general obligation to offer pointers and explanations - especially if they are sought with a view to giving one party in adversarial proceedings a procedural advantage over the other.

Rather, each party - itself, exclusively, and admissibly - must make all the submissions on which its requests are based. In the present proceedings, the admissibility flaws set out above could not in any case have been rectified afterwards, in the same proceedings. The requirements under Article 12a(5) RPEBA for a request under Article 12a(1) RPEBA must be fulfilled at the time of its submission.

- 8.6 Thus it was not possible, for legal reasons, to accede to the petitioner's representatives' request as worded and substantiated.

Request and proposal on costs

9. Given the outcome of these proceedings, in the absence of special circumstances, reimbursement under Article 12a(10) RPEBA of all costs incurred by the respondent in the proceedings before the Enlarged Board is to be proposed.

The petitioner has given no convincing reasons why reimbursement should be limited, and nor are any otherwise apparent. As far as the petitioner's representatives argue that only legal costs under German law should be reimbursed, and they should be limited to

those incurred on the issue of the AC request's admissibility, this is a matter of the costs' actual calculation and fixing, which are the petitioner's responsibility. However, the Enlarged Board would point out that its former chairwoman's order of 2 July 2015 instructed the respondent to present a defence against all aspects of the AC request, not limiting in any way the issues to be addressed, and that his written defence in these proceedings covered the merits of the AC request as well as its admissibility.

Order

For these reasons it is decided that:

- 1. The request of 25 June 2015 is rejected as inadmissible.**
- 2. The reimbursement of all costs incurred by the respondent in the proceedings before the Enlarged Board of Appeal is proposed.**

The Registrar

The Chairman

W. Crasborn

I. Beckedorf